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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ROBLES GONZALEZ, Defendant and Appellant.	H037185 (Santa Clara County Super. Ct. No. C1078514)

A jury convicted defendant Daniel Robles Gonzalez of inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)).[1] He waived his right to a jury trial on two prior strike conviction allegations (§§ 667, subds. (b)-(i); 1170.12), which were found true in a bifurcated court trial. After a *Romero*[2] hearing, the court struck one of the strike findings and imposed an eight-year prison sentence.

On appeal, defendant contends that the trial court (1) prejudicially abused its discretion in admitting evidence of his other acts of domestic violence and (2) erred in concluding that his Texas burglary conviction qualified as a strike. We affirm.

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1 Further statutory references are to the Penal Code unless otherwise noted.

2 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

I. Background

In the early evening on June 2, 2010, San Jose police were dispatched to "a disturbance" at a house on North Sixth Street. Defendant answered the door.

Officer Nabil Haidar found defendant's girlfriend Nancy King crying in a bedroom. "She . . . had bruises on her face, puffy eyes," and she seemed "scared." King also had "[s]ome bruises, red marks around her neck." She appeared to be under the influence of alcohol "to a point where . . . she could not take care of herself." King did not want to talk to the officers. She told Haidar "she got beat up two days ago," but when he asked for more information, "[s]he did not say anything."

The arrival of the police brought curious neighbors outside. Eligio Hernandez lived in the back unit of the duplex next door. Officer Ryan Ferguson spoke with him in the driveway between the two residences, with another witness, Reymundo Lopez, acting as a Spanish language interpreter. Ferguson described Hernandez as "calm and cooperative" and said he saw no indication that he had been drinking.

Hernandez said defendant and King were "always fighting." He had seen them arguing on their front porch that evening; defendant wanted more beer, and King "tried to grab the beer from him." Hernandez told Ferguson he saw King throw the bottle of beer when "it appeared that [defendant] was going to hit her with [it]." "[T]hey were there arguing with the bottle, and pulling the bottle, and then the bottle went flying" and shattered in the driveway.

Ferguson also spoke with Lopez, who was "calm and cooperative" and did not appear to have been drinking. Lopez was outside that evening, and the sound of a bottle breaking caught his attention. He told Ferguson he had seen King with an injury to her eye six days before, on May 27, 2010.

Ferguson photographed King's injuries, which included "bruising around *both* eyes," with one eye "worse than the other," although Ferguson could not recall which eye that was. (Italics added.) Haidar took defendant to jail.

The prosecution moved in limine to admit evidence of defendant's other acts of domestic violence (Evid. Code, § 1109). The prosecution proposed that Lopez would testify, as he had at the preliminary examination, that when he first moved into the house around May 12 or 13, 2010, King's *right* eye was black. The prosecution also sought to admit the testimony of defendant's former girlfriend Margaret Bettencourt. The motion papers explained that "[o]n February 19, 1999 [defendant] came into [Bettencourt's] children's room . . . and began attacking her with a large kitchen knife. He stabbed her multiple times as well as punched and kicked her. She suffered stab wounds to her left arm, abdomen, back, and shoulder as well as a fractured left radius." Defendant was convicted in that case of aggravated assault and infliction of corporal injury on a cohabitant with numerous enhancements, and he received a nine-year prison sentence.

Defendant opposed the motion, arguing that Lopez's statements were "entirely based on speculation" and that the 1999 incident was too remote (Evid. Code, § 1109, subd. (e)) and likely to confuse or mislead the jury, given the "dissimilarity" between it and the current incident.

Expressly finding that the probative value of both incidents outweighed any prejudicial effect, the court granted the motion. It "underscore[d] that with respect to the 1999 incident, yes, it is 11 years old. However, the People's point is very well taken that the defendant did serve a nine-year state prison term in the interim." The court denied defendant's request to sanitize the 1999 conviction but granted a defense request that Bettencourt be admonished not to mention the sentence defendant received for his 1999 crimes.

King failed to appear on the first day of trial, and the court issued a body attachment, which was recalled when she appeared several days later. She testified that she was still "romantically involved" with defendant and "still in love with him." She acknowledged that she was testifying under subpoena, but said she was also there "for his behalf."

King testified that she had been living at the North Sixth Street house with roommates Mario (the owner of the house), Raphael, and Manuel for about a year and a half when she met defendant. She "used to" socialize with her roommates, and everyone in the house got along pretty well. That changed in February 2010, when she started dating defendant, who moved in with her. King felt the others were jealous of the relationship for two reasons: because defendant "used to hang out with them and drink and party . . . , and he no longer did that," and because "[t]hey didn't like [her] with anyone because each one of them had tried to hit on [her] at one time or another."

On June 2, 2010, King and defendant did some lawn work and drank "a couple of beers." King had a black eye that had "happened at the end of May," and they argued about that because defendant thought her ex-boyfriend Walter Norris had inflicted it. The topic was "sort of an ongoing thing" between them, and defendant had asked her several times whether she had seen Norris driving by the house. The June 2, 2010 argument was "loud." "Well, I'm Italian. He's Mexican. We are pretty loud," King explained. All of a sudden, "there was a knock on the door, and then I opened it, and the Police Department was there."

It was King's *left* eye that she and defendant were arguing about on June 2, 2010. King also had scratches on her forehead and on her left cheek. She claimed she went to the store in the late afternoon "around May 21st," and "[t]his girl asked me for money." King described her as "an Indian, [with] like an Aztec-looking face," "five-seven, five-six," and "probably about 180, 170 pounds." King told the woman she had no money. "I go in the store. . . . I come back out. I'm going down the street. She jumps me. I don't even know where she came out of. . . . She knocks me to the ground. She's kicking, she's punching me." "She hit me in my eye. She kicked my eye. She kicked my neck, my back before I could get up." King did not report the incident to police.

Asked what the name of the store was, King replied, "One is Smiles. And one is Jake's, I believe, or Kelly's." She said the store was located "[a]t Fourth and Empire."

She acknowledged testifying at the preliminary examination that it was on Fifth Street. "That's right. Because I do believe -- I thought it was on Fifth, but it's Fourth." King emphatically denied having described her attacker as "'short, stocky, five-six, maybe, [and] Mexican'" at the preliminary examination. She also denied testifying that the assault had occurred about 6:30 or 7:00 p.m., when it was no longer light out. She "absolutely" denied telling officers she had been beaten up just two days before they came to the house on June 2, 2010.

Jurors were shown six photographs that Ferguson had taken on June 2, 2010, which King testified was "about a week and a half after" she was attacked at the store. "I've seen them all. I know exactly what happened to me. It's pretty ugly," King volunteered. She said that the photographs accurately depicted what her injuries looked like on June 2, 2010. When defendant's trial counsel noted that the photos appeared to depict "some dark marks" around both eyes and asked how much was "smeared makeup versus a potential bruise," King (who had just testified that she could not remember whether she had been crying before they were taken) responded that one eye was "totally makeup," and the other was "the old bruise from when I got beat up." She claimed she had tried to tell Haidar "the truth," but he "didn't want to hear it because of my face." "He just said [to Ferguson], 'She's in denial. Take a picture.'"

King had been the victim of domestic violence during a nine-year "on and off" relationship with Norris. An incident in 2007 required staples in her head, and she said she had learned her lesson. "Well, I definitely wouldn't let a man beat on me." "I would call the police. I would, indeed, call the police." She denied any domestic violence in her relationship with defendant. He had never hit or choked or strangled her. "No. He's always protected me." The June 2, 2010 beer-bottle-throwing incident was just an argument, "[a]nd the whole thing just got blown out of proportion" by some of her roommates and neighbors, whom she claimed had been drinking "since eight o'clock in

the morning." Asked if she was just protecting defendant, King replied, "Absolutely not."

Hernandez testified through an interpreter that he exchanged neighborly greetings with defendant and "the lady that lives there too," but nothing more, "since I cannot speak English to her." He had never made any sort of romantic gesture toward or propositioned King. He was not drunk on June 2, 2010. He was sitting outside his apartment that evening, and he heard defendant and King "yelling" and "arguing by the porch" sometime between 7:00 and 8:00 p.m. He could not see them, but he saw "the bottle that went flying."

Lopez testified that he lived in Manuel's room at the North Sixth Street house for about three weeks in May 2010. Manuel's room was across the hallway from the room King shared with defendant, and Lopez heard them arguing "[q]uite a bit." When he arrived around May 13, 2010, Lopez noticed King "had a black eye." "And two bottom teeth missing." The first black eye that Lopez noticed "between, okay, [May] 11, 12, 13th somewhere" was King's right eye.

About two weeks later, at around 10:00 p.m. sometime in the last week of May, Lopez was awakened by defendant's pounding on the bedroom door across the hall and yelling at King to open it. She refused, "[a]nd he says: 'Okay, I'll wait until you come out, and then I'm going to kick your fucking ass.'" King opened the door, and Lopez heard "[a] scuffle"—"[s]omeone pushing something against the wall or on top of furniture. Something like that." After that, he heard King say, "'Danny, stop hitting me. Stop hitting me.'" Her voice was "[k]ind of loud . . . [and] kind of in an angry tone." The next thing Lopez heard was King "crying out for Mario to get Danny off because he was choking her." Mario's room was in the garage, "only about five inches away" from King's. Lopez described King's voice as "kind of a harsh tone when she was crying out for Mario," and then "her voice dropped," like she was "gagging." Lopez, who remained

in his room, next heard Mario telling defendant to "sleep it off" on the couch in the living room. After that, "everything was quiet."

Lopez acknowledged drinking "probably earlier in the morning or in the afternoon," but said the effects had worn off when the "scuffle" occurred.

Lopez had seen King earlier that day, and she was her "[u]sual self." The day after the end-of-May scuffle, "[s]he had her sunglasses on." She was sitting next to him outside, and he could see behind her sunglasses that her left eye "was just bruised up. I mean bulging." King's left eye looked "[n]asty" and "swollen." The injury that Lopez observed the day after the end-of-May scuffle was worse than the injury depicted in the photographs taken on June 2, 2010. "These pictures were taken at a later time, because [in the photos] her eye is not like it was bulging out. These are already bruised-up, already colored."

Lopez testified that King's end-of-May black *left* eye was not her first since his return to town. The black eye he had noticed in mid-May "was the *other* eye." (Italics added.)

Lopez testified that he was outside when defendant and King were arguing on June 2, 2010, but he had his back turned. He heard profanity back and forth, and then a bottle bounced off a tree and broke on the concrete driveway. He did not see who threw it.

Officer Roland Ramirez testified that he investigated a domestic violence situation involving King and Norris in October 2007. King told him during that investigation that she had suffered but not reported "approximately 20" instances of domestic violence by Norris.

Officer Matt McLinden testified that he investigated a domestic violence incident involving defendant and Bettencourt in 1999. McLinden met Bettencourt at a hospital and photographed her injuries. She had bruising on her arms and back and bandages on both forearms, her abdomen, and below her left shoulder blade.

Bettencourt testified that she and defendant lived together for three months in 1998 and 1999. During an argument, she told him to "call his mom back in Texas" and "just go home." She walked into her children's room, and he went into the kitchen. "[W]hen he came back, he had a knife," and he stabbed her, necessitating "major surgery" on her arm and stomach. She spent eight or nine days in the hospital, and the attack left her with "six or seven" scars.

The parties stipulated that defendant was convicted in 1999 of assault with a deadly weapon (§ 245, subd. (a)(1)) and infliction of corporal injury on a cohabitant (§ 273.5, subd. (a)) with numerous enhancements (§ 12022.7, subds. (a), (b), & (d)).

The jury deliberated for less than four and a half hours before returning a guilty verdict. Defendant was sentenced to eight years in prison. He filed a timely notice of appeal.

II. Discussion

A. Prior Acts of Domestic Violence

Defendant argues that the trial court abused its discretion by failing to exclude evidence of King's mid-May black eye and Bettencourt's stabbing.

Evidence Code section 1109 provides an exception to the evidentiary bar of Evidence Code section 1101, subdivision (a) by allowing evidence of a criminal defendant's other acts of domestic violence "if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a);[3] *People v. Hoover* (2000) 77

[3] Evidence Code section 1109 provides in pertinent part that "[e]xcept as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. [¶] . . . [¶] (c) This section shall not be construed to limit or preclude the admission or consideration of evidence under any other statute or case law. [¶] (d) As used in this section: [¶] . . . [¶] (3) 'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. . . . [¶] (e) Evidence of acts

Cal.App.4th 1020, 1025-1026.) Such evidence is relevant not only to corroborate allegations of a current offense (see *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1334) but also to prove elements of the charged offense. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 920 (*Falsetta*) ["evidence of a defendant's other sex offenses constitutes relevant circumstantial evidence that he committed the charged sex offenses."]; (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1237 (*Brown*) ["a defendant's propensity to commit domestic violence against a former girlfriend who was murdered, and other prior girlfriends who were assaulted, is relevant and probative to an element of murder . . . ."].)

Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing issues, or of misleading the jury." In reviewing the admissibility of evidence under Evidence Code sections 1109 and 352, trial courts consider the "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, [and] the burden on the defendant in defending against the uncharged offense . . . . [Citations.]" (*Falsetta*, *supra*, 21 Cal.4th at p. 917.) We review the admissibility of this evidence under the abuse of discretion standard, and the trial court's "exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*Brown*, *supra*, 192 Cal.App.4th at p. 1233.)

Defendant claims there was insufficient evidence to prove that he inflicted the black eye that Lopez noticed around May 13, 2010, since Lopez did not see him hit King

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occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." (Evid. Code, § 1109.)

and could not reliably comment on defendant's behavior after "only three weeks" in the house. He relies on *People v. Albertson* (1944) 23 Cal.2d 550 (*Albertson*), disapproved in *People v. Carpenter* (1997) 15 Cal.4th, 312, 381-382, disapproved on another ground in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106, in which the court held that other crimes evidence should not be admitted without substantial evidence that the defendant committed the other crimes. (*Albertson*, at pp. 580-581.)

Here, there was no trial testimony linking defendant to King's earlier black eye; Lopez testified only to its existence. Indeed, he made it clear he had no idea who had inflicted the mid-May black eye, telling the jury, "That was another incident. I was not even around." He later reiterated that "[t]hat first one, who did it, I don't know."

The lack of any link between defendant and the first black eye makes any error in admitting the challenged testimony harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Not only was there no evidence, but the prosecutor in her closing argument specifically told the jury that they could not rely on the prior acts unless they found that those acts had been proven by a preponderance of the evidence. The trial court also instructed the jury pursuant to CALCRIM No. 852 that it could consider the uncharged evidence of "the early May 2010 black eye incident" "*only if* the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence," and that "[i]f the People have not met this burden, *you must disregard this evidence entirely*." (Italics added.) We must presume that the jury understood and followed these instructions. (*People v. Panah* (2005) 35 Cal.4th 395, 492 (*Panah*).)

Defendant next argues that even if the evidence about the earlier black eye was sufficient, the prejudicial effect of Lopez's testimony substantially outweighed its probative value. We disagree. The testimony was relevant because it differentiated King's mid-May black *right* eye from her end-of-May black *left* eye, giving context to the photographs, which showed "bruising around both eyes." If there was any prejudicial

effect at all, it was slight. Lopez's limited testimony did not attribute the earlier black eye to defendant, the prosecutor made only brief mention of it during closing argument, and we presume the jury followed the court's instruction that it could not rely on the injury unless they found by a preponderance of the evidence that defendant inflicted it. (*Panah*, *supra*, 35 Cal.4th at p. 492.)

Defendant next claims that the facts of his 1999 offense against Bettencourt were "so dissimilar" to the facts of this case that the probative value of the 1999 offense was "essentially nonexistent." He argues that the 1999 attack occurred 11 years earlier, against a different victim in the presence of her children, and involved the use of a knife, whereas "no weapons were used" in the present attack, which occurred when defendant and King were alone in their bedroom. Defendant's characterization overlooks the obvious similarities between the two offenses: both were committed against cohabiting romantic partners, both began with a verbal argument, and in both cases, defendant's anger erupted into physical violence.

The statutory presumption against admitting evidence of conduct more than 10 years old is overcome if the court determines that admission of the evidence is "in the interest of justice." (Evid. Code, § 1109, subd. (e).) Trial courts are vested "with substantial discretion" in determining whether the interest of justice standard is satisfied, and "the exception is met where the trial court engages in a balancing . . . under section 352 and concludes . . . that the evidence was 'more probative than prejudicial.'" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 530, 539-540 (*Johnson*).) In engaging in that balancing here and concluding that the evidence remained probative, the court expressly "underscore[d]" that while defendant's conviction was 11 years old, he had spent nine of those years in prison. He was still on parole when he attacked King.

Since this was not a case in which defendant had led "a substantially blameless life in the interim," the evidence was not so remote as to diminish its probative value. (*Johnson*, *supra*, 185 Cal.App.4th at p. 534.) Defendant had, moreover, been convicted

in the 1999 case, and the jury was so informed, which minimized any danger that the jury would find him guilty of the present offense to punish him for the prior offense. (See *Falsetta*, *supra*, 21 Cal.4th at p. 917.)

The fact that defendant's prior offense involved a different victim does not lessen its probative value. The legislative history of Evidence Code section 1109 reflects the Legislature's recognition of "the 'typically repetitive nature' of domestic violence" and its intent to make admissible a prior incident "'committed against the victim of the charged crime *or another similarly situated person.*'" (*Johnson*, *supra*, 185 Cal.App.4th at p. 532, italics added, quoting Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1876 (1995-1996 Reg. Sess.) June 25, 1996, p. 5.) Courts routinely admit evidence of a defendant's acts of domestic violence against former romantic partners if that evidence passes muster under Evidence Code section 352. In *Brown*, for example, four of the defendant's former girlfriends testified at his trial for murdering a fifth former girlfriend. (*Brown*, *supra*, 192 Cal.App.4th at p. 1231; see also *Johnson*, at pp. 530-531, 537 [evidence that the defendant shot at two former girlfriends properly admitted at his trial for attempted murder of a third former girlfriend].)

Defendant argues that the prejudicial effect of the evidence was increased because the facts of the 1999 offense were "so much more inflammatory than the facts of the current case." Evidence of defendant's stabbing of Bettencourt certainly did not help him, but that does not mean it was unduly prejudicial. (*Johnson*, *supra*, 185 Cal.App.4th at p. 534 ["The word 'prejudicial' is not synonymous with 'damaging.'"].) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

We see little if any danger that Bettencourt's testimony would have evoked an emotional bias from the jury. Her straightforward testimony on direct was without excessive detail, and there was no cross-examination. She was on the stand for only 10

minutes of the approximately two days of testimony from seven witnesses. We conclude that the trial court did not abuse its discretion in admitting evidence of defendant's prior domestic violence against Bettencourt.

B. Prior Burglary Conviction

Defendant claims there was insufficient evidence to support the trial court's conclusion that his Texas burglary conviction qualified as a strike. The Attorney General counters that the claim is moot because the court struck the finding. Defendant argues, however, that the trial court "assumed [he] had *two* valid strikes when it decided to strike one of them." Had it realized there was "*only one* valid strike," the court "could have decided the current crime was relatively minimal and dismissed the one valid strike." We address the merits of defendant's contention that there was insufficient evidence to support a finding that the Texas burglary conviction was a strike.

"[I]n determining the truth of a prior-conviction allegation, the trier of fact may look to the entire record of the conviction." (*People v. Guerrero* (1988) 44 Cal.3d 343, 345.) That record includes transcripts of the preliminary hearing, the defendant's guilty or no contest plea, and the transcript of the sentencing hearing. (*Ibid.*; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101.) "The normal rules of hearsay generally apply to evidence admitted as part of the record of conviction to show the conduct underlying the conviction. [Citation.]" (*People v. Woodell* (1998) 17 Cal.4th 448, 458.) Thus, a statement in the record of conviction offered to prove its truth must fall within an exception to the hearsay rule. (*People v. Reed* (1996) 13 Cal.4th 217, 230-231.)

When a defendant challenges the sufficiency of the evidence to sustain the trial court's findings on an enhancement allegation, we determine whether substantial evidence supports that finding. " 'The test on appeal is simply whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the

enhancement beyond a reasonable doubt.' [Citation.]" (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.)

Defendant claims that the evidence was insufficient here. He argues that the court could not rely on "the facts contained in the police report and the summary of [his] confession" to find the prior conviction allegation true because the confession "was contained in a police report" obtained from Texas, "and a police report is not part of the record of conviction." Defendant is correct that a police report "is not an abstract of judgment; nor does it ordinarily form part of the record of conviction." (*Draeger v. Reed* (1999) 69 Cal.App.4th 1511, 1523.) His argument overlooks an important fact, however: When he pleaded guilty to the Texas crime, he expressly agreed to have his written confession incorporated into and made a part of his plea document. A plea document is part of the record of conviction, as defendant acknowledges. (*People v. Guerrero* (1988) 44 Cal.3d 343, 345, 356 [court properly considered accusatory pleading and the defendant's plea].)

The certified copy of defendant's Texas plea document is entitled "Written Waiver and Consent to Stipulation of Testimony, Waiver of Jury, and Plea of Guilty." He and his Texas trial counsel signed it, and the trial court approved it when defendant entered his guilty plea. The document reflects defendant's express agreement that "[t]he State may introduce affidavits, written statements of witnesses and any other documentary evidence in support of any judgment that may be entered in this cause, *which are marked STATE'S EXHIBITS 1 through 5, inclusive, and made a part hereof*; that such stipulated evidence is true and correct; that the Defendant is the identical person referred to in the exhibits and stipulated evidence and if the witnesses were present, sworn, and testifying, under oath, that they would testify as set out in their written statements and would identify the Defendant as the person of whom they speak in said exhibits and stipulations . . . ." (Italics added.) Defendant's written confession, marked "SX-4," is one of the exhibits that was expressly "made a part" of the plea document. In that confession,

defendant admits that "around [ ]midnight" on the night of the burglary, he and an accomplice were dropped off on a street corner and told "to wait for the guy who dropped us off." After waiting for a while, "[w]e decided to break into the house on the corner. The guy I was with broke the window glass with a rock . . . . After we got in the house I told the other guy to get the television and I took a butterfly knife that I found. Then we got into a [*sic*] argument about the television and then we left through the door. As we left the house we was [*sic*] chased by a big guy who had a gun and we stopped and was keep their [*sic*] until the cops got there."

We think the trial court could reasonably have concluded from defendant's confession that the Texas "habitation" he burglarized was currently being used for dwelling purposes, as California law requires. (§ 459.) The court could infer from the television inside that the "house" was not abandoned or empty. It could also infer that "the big guy" with the gun who chased defendant and his accomplice as they were leaving had been awakened or alerted by the sound of the window glass breaking. Thus, there was substantial evidence to support a finding that the house was being used as a dwelling.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.